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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1998

GREATER NEW ORLEANS BROADCASTING  
ASSOCIATION, INC., *et al.*,  
v. *Petitioners*,  
UNITED STATES OF AMERICA, *et al.*,  
*Respondents*.

On Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit

**BRIEF AMICUS CURIAE FOR THE  
AMERICAN GAMING ASSOCIATION  
IN SUPPORT OF PETITIONERS**

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BRIEF AMICUS CURIAE FOR THE  
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STATEMENT OF INTEREST OF AMICUS CURIAE

The American Gaming Association ("AGA") was founded in 1995 to represent the gaming-entertainment industry by addressing regulatory, legislative, and educational issues.<sup>1</sup> Its mission is to develop a comprehensive gaming-entertainment industry information database and to serve as a clearinghouse for information, to design educational and advocacy programs concerning casino

<sup>1</sup> No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. S. Ct. Rule 37.6. The brief is filed with consent of the parties, and copies of the consent letters have been filed with the Clerk.



gaming, and to provide leadership in addressing industry issues of public concern.

This case will have a direct and substantial impact on the AGA and its members in the gaming-entertainment industry by determining whether the government may continue to suppress the broadcast of casino gaming advertisements. Neither petitioner nor the other amici, however, represent the gaming interests that will be affected by the Court's decision in this significant First Amendment case. The AGA can provide this Court with an essential perspective on the effect and implications of continuing to ban the broadcast of casino gaming advertisements that would otherwise not be available to the Court.

The AGA also has a particular interest in ensuring that unsupported assumptions about casino gaming do not infect the record in this case. The government submitted no evidence to the District Court or the Fifth Circuit to document the social and economic impacts of casino gaming, *see* Opp. at 18, but it has submitted a three-volume lodging to this Court containing materials it filed in *Players Int'l, Inc. v. United States*, 988 F. Supp. 497 (D.N.J. 1997), *appeal docketed*, Nos. 98-5127 & 98-5242 (3d Cir. Feb. 26, 1998). The evidence in the government's lodging is outdated, factually incorrect, and unsubstantiated, and the AGA is concerned that the Court may rely on the government's invalid studies in the absence of any contrary views. The AGA therefore offers this Court an overview of the more current and reliable studies on the social and economic impacts of the commercial casino industry. This overview demonstrates that the government has not carried its burden of justifying a law that "seek[s] to keep people in the dark for what the government perceives to be their own good." 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (Stevens, J.).

#### SUMMARY OF ARGUMENT

The Fifth Circuit's holding in this case violates the fundamental principle that the government may not em-

ploy unsubstantiated assertions and unreliable evidence to justify the suppression of truthful, non-misleading commercial speech. This Court's First Amendment jurisprudence establishes that the government may only restrict protected commercial speech when necessary to directly advance substantial interests.

Here, however, the government has relied on "junk social science" and a federal scheme riddled with exceptions to defend its suppression of broadcast advertisements for commercial casino gaming. In particular, the government has failed to produce adequate information to show that reducing participation in casino gaming constitutes a substantial governmental interest. Moreover, even if the government had the evidence to prove such an interest, the means it has chosen to further that interest cannot survive constitutional scrutiny. The government has failed to demonstrate that the advertising ban directly advances the interests it asserts. And it has failed to establish that the ban is proportional, narrowly tailored, and no more restrictive than required. This Court should therefore hold that the federal restriction on the broadcast of casino gaming advertisements is unconstitutional.

#### ARGUMENT

The federal prohibition on broadcast advertisements for "any lottery, gift enterprise, or similar scheme," 18 U.S.C. § 1304, violates the First Amendment and cannot be upheld on the basis of the Fifth Circuit's invalid and unsupported assumptions concerning the perceived dangers of commercial casino gaming.<sup>2</sup> That court upheld the constitutionality of 18 U.S.C. § 1304 under the four-part test first articulated in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980). *See* Pet. App. 2a. At least one member of this Court has disavowed *Central Hudson*, *see* 44 *Liquormart*, 517

<sup>2</sup> Section 1304 bans only the depiction of casino gaming activities; it does not proscribe advertisements which highlight other features of the gaming-entertainment industry, such as food, concerts, etc.

U.S. at 518 (Thomas, J., concurring), and other amici here urge the Court to abandon *Central Hudson* in favor of strict scrutiny. See Br. Amicus Curiae for the Association of National Advertisers. The AGA supports these efforts and believes that content-based restrictions on truthful, non-misleading commercial speech should be subject to the same First Amendment analysis applied to non-commercial speech. The statute at issue, however, cannot withstand even the more lenient constitutional inquiry established in *Central Hudson*; we therefore analyze the case under those principles.

The *Central Hudson* inquiry proceeds in four steps:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. [447 U.S. at 566.]

The first prong of the test—whether the commercial speech is lawful and not misleading—is not in dispute. The government conceded below that petitioners seek only to broadcast truthful advertising about legal casino gaming activities. See Pet. App. 28a. The Fifth Circuit's decision to sustain § 1304 under the remaining three factors was, however, misguided. The government has not met its burden to marshal credible evidence in support of its proffered interests, and the numerous exceptions to the federal scheme, in concert with the availability of less speech-restrictive alternatives, render the statute unconstitutional under any reading of the protections afforded to commercial speech.

# I. THE GOVERNMENT HAS ASSERTED NO SUBSTANTIAL INTEREST SUFFICIENT TO SUSTAIN A BAN ON THE BROADCAST OF CASINO GAMING ADVERTISEMENTS.

The second prong of the *Central Hudson* test requires the government to “assert a substantial interest to be achieved by restrictions on commercial speech.” 447 U.S. at 564. This burden cannot be “satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real.” *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995).

For example, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648-649 (1985), the Court rejected the government's argument that a ban on illustrations in attorney advertisements could be justified by unsubstantiated claims that the public would be misled, manipulated, or confused. Finding that “the State's arguments amount to little more than unsupported assertions,” the Court concluded that the State's interest was insufficient, because the State had failed to offer “any evidence or authority of any kind” to support its contentions. *Id.* Thus, “[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.” *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983).

Against this background, the government asserts two purportedly substantial interests in this case—discouraging public participation in commercial gaming, and assisting the policies of States that restrict gaming by regulating the interstate broadcast of casino gaming advertisements. See Pet. App. 4a. Although the government attempts to characterize the two interests as separate, they are in fact closely related. In choosing to aid the policies of non-gaming States, the government obviously frustrates the interests of pro-gaming States which would prefer to allow, if not encourage, the broadcast of casino gaming



advertisements. Thus, the decision to protect the interests of non-gaming States, rather than gaming States, can only be justified if the interests of non-gaming States are more significant. Ultimately, then, the government must offer credible evidence to demonstrate that reducing involvement in casino gaming constitutes a substantial governmental interest.

The Fifth Circuit found the government's interest in discouraging casino gaming to be substantial by relying primarily upon this Court's decision in *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986). See Pet. App. 4a, 31a-32a. *Posadas* involved a challenge to the constitutionality of a Puerto Rico statute and regulations prohibiting the advertisement of casino gaming. In supporting the advertising restrictions, the Puerto Rican government asserted that the interest at stake was "the reduction of demand for casino gambling by the residents of Puerto Rico." 478 U.S. at 341. In particular, the government argued that excessive gambling "would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens." *Id.* (quoting Br. for Appellees at 37). This Court had "no difficulty in concluding that the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest," *id.*, and it therefore upheld the restrictions under the second prong of the *Central Hudson* test.

*Posadas*, however, is not dispositive in this case, for at least two reasons. First, the Court did not hold in *Posadas* that reducing participation in casino gaming is a substantial interest, but only that the protection of "health, safety, and welfare"—standing alone—is a substantial interest. *Id.* The Court assumed, without examining any evidence from the parties, that casino gaming would impair the health, safety, and welfare of the citizenry. As several members of this Court and the government have acknowledged, *Posadas* did not require any evidentiary showing concerning the hazards of casino gaming; it merely presumed that the connection could be

made and it accepted the government's rationale without further inquiry. See 44 *Liquormart*, 517 U.S. at 531 (O'Connor, J., concurring); Opp. at 18. As we explain more fully below, however, that assumption is unsupported.

Second, the approach taken by *Posadas* has since been substantially undermined. In case after case since *Posadas*, "this Court has examined more searchingly the State's professed goal \* \* \* before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny." 44 *Liquormart*, 517 U.S. at 531 (O'Connor, J., concurring) (citing five post-*Posadas* decisions). "In each of these cases we declined to accept at face value the proffered justification for the State's regulation, but examined carefully the relationship between the asserted goal and the speech restriction used to reach that goal." *Id.*

Accordingly, the conclusion reached in *Posadas* will not shield § 1304 from constitutional attack unless the government can satisfy its burden to present credible evidence of the deleterious effects of casino gaming. In light of recent studies on the effects of casino gaming, and considering the significant flaws in the government's lodging, the Court should find that the government has failed to satisfy this fundamental obligation.

#### A. Casino Gaming Does Not Produce Substantially Harmful Effects.

The government's assertion that casino gaming creates significant harms is not supported by the more recent, reliable studies detailing the impacts of gaming. The government's lodging identifies three primary harms of casino gaming: (1) crime, including street crime and organized crime; (2) compulsive gambling; and (3) suicide. The evidence demonstrates, however, that these concerns are greatly exaggerated and are counterbalanced by the substantial benefits that casino gaming produces for America's communities.



**1. Casino gaming does not substantially increase crime.**

An analysis of the data and the literature regarding the connection between casinos and street crime reveals that there is "little evidence to support the notion that the presence of casino gaming in a community has any meaningful impact on crime rates." Jeremy Margolis, *Casinos and Crime: An Analysis of the Evidence* 3 (Dec. 1997) (AGAL 1).<sup>3</sup> The most significant evidence on this issue was released just this month by the National Opinion Research Council ("NORC") at the University of Chicago, a non-partisan organization authorized to study the positive and negative effects of all forms of gaming in America by the National Gambling Impact Study Commission ("NGISC"), itself a bipartisan commission created by Congress. See National Gambling Impact Study Commission Act, Pub. L. No. 104-169, 110 Stat. 1482 (1996). The \$1.24 million NORC study—the first national survey of gaming behavior conducted since the previous national commission studied the issue in 1976—compiled publicly-available information on the impacts of gaming in 100 communities across the country. See *Overview of National Survey and Community Database Research on Gambling Behavior*, Report to the Nat'l Gambling Impact Study Comm'n, Nat'l Opinion Research Council at Univ. of Chicago, at 2-5 (Feb. 1, 1999) ("NORC Study") (AGAL 2).

With respect to the connection between gaming and street crime, the authors' findings were clear—"the casino effect is not statistically significant for any \* \* \* crime outcome measures." *Id.* at 52. The NORC's research revealed that any casino-related crime is either "small enough as not to be noticeable in the general wash of the statistics," or easily "countered by other effects." *Id.* Indeed, the study concluded that "[t]he net picture in

<sup>3</sup> The various studies and articles cited in this brief have been lodged with the Clerk for the convenience of the Court. The "AGAL" cite refers to the number of the document within the American Gaming Association Lodging.

the economic and crime data is on the *positive* side," albeit "not in an overwhelming way." *Id.* at 53 (emphasis added).

Additional studies confirm the NORC's findings. For example, after reviewing more than twenty-seven empirical studies on gaming and crime, and after analyzing the FBI's Uniform Crime Reports ("UCR"), one researcher concluded that "communities with casinos are just as safe as communities that do not have casinos." Margolis, *supra*, at 1 (AGAL 1). Rather than expanding after the introduction of gaming activities, "[c]rime patterns tend to ebb and flow in general trends explicable only by the interplay of powerful social forces." *Id.* at 26. In fact, once visitor increases in total population in gaming communities are accounted for, "there is no increase in crime rates when comparing pre- and post-casino periods." *Id.* at 1.

The FBI's UCR numbers reinforce these conclusions. According to the 1996 UCR, Las Vegas had a lower crime rate than many other non-casino gaming American tourist destinations, including Miami, New Orleans, Honolulu, and Phoenix. U.S. Dep't of Justice, Federal Bureau of Investigation, *Crime in the United States: Uniform Crime Reports* 84-110 (1996) (AGAL 3). Likewise, crime decreased in Baton Rouge, Louisiana after two casinos opened there in late 1994, and in Shreveport, Louisiana following the introduction of casino gaming in that city in April 1994. *Id.*; Margolis, *supra*, at 33 (AGAL 1). And these low crime rates are rarely attributable to a substantial rise in police resources; Las Vegas, for instance, had one of the lowest officer to population ratios among major American cities in 1996. *Uniform Crime Reports*, at 293-364 (AGAL 3).

The statements of law enforcement officials in gaming jurisdictions further support these views. Although the officials' statements lack the force of scientific research, it is still worth noting that many local officials have found

no empirical link between gaming and crime. In testimony before the NGISC, for example, New Jersey Attorney General Peter Verniero declared that crime in his State "is actually lower today than before the advent of casinos." Peter Verniero, *Testimony Before the NGISC* (Jan. 21, 1998, at 50).<sup>4</sup> Likewise, Donald Sandridge, mayor of Alton, Illinois, testified that "critics of riverboat gaming projected increases of crime, prostitution, and organized crime activities \* \* \* but none of those have occurred." Donald Sandridge, *Testimony Before the NGISC* (May 20, 1998, at 20). Quoting the State Attorney, Sandridge noted that "there's been absolutely no crime problem occurring in Madison County which has resulted from the operation of the Alton Belle casino on the Alton Illinois riverfront." *Id.* The executive director of the Mississippi Coast Crime Commission reported as well that "[o]ur crime office has no direct evidence to indicate that casinos have caused an increase of crime along our three-county coast from 1994 to 1997." Bob Waterbury, *Testimony Before the NGISC* (Sept. 10, 1998, at 249). And St. Charles, Missouri Police Chief David King wrote that, in his community, "none of the gambling opponents' predictions of violent crime, corruption of public officials, prostitution, or the like have occurred." David King, *Everything's Coming Up Aces in St. Charles*, 12 Missouri Police Chief 4 (Spring 1995) (AGAL 4).

In addition, there is no support for the myth that modern gaming is directly linked to organized crime. While gaming's history is peppered with tales of organized crime, the "presence and/or influence of organized crime is no longer a factor in the modern, regulated gaming-entertainment industry." Margolis, *supra*, at 2 (AGAL 1). For one thing, there is "no industry in America more regulated than the casino industry." Hon. Robert

<sup>4</sup> All testimony before the NGISC is available on the National Gambling Impact Study Commission Internet Site at <<http://www.ngisc.gov/meetings/meetings.html>>.

Torricelli, *Testimony Before the NGISC* (Jan. 21, 1998, at 21-22). Casino license applicants typically provide state regulators with exhaustive information on each employee, including fingerprints and identifying marks, family members, residential, employment, criminal and educational histories, character references, tax information, litigation and licensure histories, and financial information. Margolis, *supra*, at 47-48 (AGAL 1). Moreover, many of the largest gaming companies, such as Harrah's Entertainment, Inc., Mirage Resorts, Inc., MGM Grand, Inc., and Park Place Entertainment Corp., are now publicly-owned, and are thus subject to the watchful eye of the Securities and Exchange Commission, other federal regulators, and their own public shareholders.

As a result, state officials are virtually unanimous in reporting that organized crime is not a factor in today's gaming-entertainment industry. A Massachusetts report concluded that "[i]ncreased state regulatory oversight has effectively cleared the casino industry of organized crime." Senate Report, The Commonwealth of Massachusetts: Senate Comm. on Post Audit and Oversight, *Toward Gaming Regulation, Part I: Crime* 1415 (1997) (AGAL 5). Similarly, regulators in Indiana, Missouri, Nevada, Iowa, and Illinois have all reported that organized crime exerts no influence on the gaming industry. Margolis, *supra*, at 49-50 (AGAL 1) (citing correspondence from leading regulators in these States). The continued misperception that organized crime is linked to the modern gaming-entertainment industry is thus not supported by the evidence.

**2. The causes of compulsive gambling are speculative and the prevalence of compulsive gambling is exaggerated.**

The casino industry has consistently emphasized that "one problem gambler is one too many," and the AGA does not dispute the serious harms that can result when disordered gamblers fail to seek, or respond to, professional assistance. Nevertheless, the government's attempt



to characterize disordered gambling as a substantial problem directly linked to legalized gaming is misplaced.

First, studies demonstrate that only a very low percentage of American adults can be classified as compulsive gamblers. The NORC study revealed that only two-thirds of one percent of the adult population in America could be classified in the last year as pathological gamblers. *NORC Study*, at 22-23 (AGAL 2). Similarly, a recent Harvard Medical School study—performed by the School's Division on Addictions—synthesized information from over 120 other gaming surveys conducted over the last twenty years and concluded that “[t]he majority of Americans and Canadians gamble with little or no adverse consequences.” Howard J. Shaffer *et al.*, *Estimating the Prevalence of Disordered Gambling Behavior in the United States and Canada: A Meta-analysis* ii (Dec. 15, 1997) (AGAL 6).

Second, the evidence does not support the assumption that compulsive gambling is directly linked to the rise in legalized gaming. Dr. Howard J. Shaffer, Director of the Harvard Medical School Division on Addictions, told the NGISC that the idea that disordered gaming is growing in direct proportion to gaming opportunities “may not be an accurate perception.” Howard J. Shaffer, *Testimony Before the NGISC* (“Shaffer Testimony”) (Jan. 22, 1998, at 61). As the NORC study concluded, the availability of a lottery and the availability of a casino within driving distance do “not appear to affect prevalence rates” for disordered gamblers. *NORC Study*, at 26 (AGAL 2); see Shaffer *et al.*, *supra*, at iv (AGAL 6) (finding “no significant regional variation in the rates of gambling disorders” despite the presence of more casinos in certain regions of the country). No research has revealed a relationship between shifting social trends and the prevalence of disordered gambling, and statistics show that gaming itself has “expanded much more rapidly than the rate of disordered gambling.” Shaffer Testimony, at 61. Thus, the “availability [of legalized gaming] is not a sufficient, sole explanation for the increased rate of gambling

as an addictive disorder in the United States.” Shaffer Testimony, at 61; see Lisa Megargle George *et al.*, *What We Need to Know About Casino Development*, 2 *Wharton Real Estate Review* 48, 60 (Spring 1998) (AGAL 7) (“[C]urrent research concerning problem gambling is inadequate to conclude whether casinos create problem gamblers.”).

### 3. Casino gaming does not increase the risk of suicide.

The claim that the expansion of legalized casino gaming elevates suicide rates is similarly groundless. “When standard statistics are used, and when the masking effects of extraneous factors are controlled, suicide levels in Atlantic City, Las Vegas, Reno and other U.S. casino resort areas are about average compared to nongaming areas.” Richard McCleary & Kenneth Chew, *Suicide and Gambling: An Analysis of Suicide Rates in U.S. Counties and Metropolitan Areas* 9 (Sept. 1998) (AGAL 8) (emphasis omitted). The data reveals that suicide rates do not increase in communities after gaming is legalized, and demonstrates that there is “no evidence to support the proposition that residents or visitors of gaming areas \* \* \* face heightened risks of suicide” because of the presence of gaming. *Id.* at 1; see Christian Marfels, *Visitor Suicides and Problem Gambling in the Las Vegas Market: A Phenomenon in Search of Evidence*, 2 *Gaming Law Review* 465, 472 (Oct. 1998) (AGAL 9) (examining the Las Vegas coroner's suicide files over an eight-year period, and concluding that “the frequent allegations of a connection between Las Vegas visitor suicides and gambling are not substantiated by fact”).<sup>5</sup>

<sup>5</sup> The Centers for Disease Control and Prevention have also determined that rates of suicide are consistently higher in the western States (including Utah, one of only three States with no form of legalized gaming), a finding which is inconsistent with the presence of gaming facilities throughout the country. *Regional Variations in Suicide Rates—United States, 1990-1994*, 46 *Morbidity and Mortality Weekly Report* 789, 790-791 (Aug. 29, 1997) (AGAL 10); see *Rate, Number, and Ranking of Suicide for Each U.S.A. State*,

4. *Any harms from gaming are offset by the industry's positive economic and social effects.*

Any evaluation of the social costs of gaming must also account for the proven economic and social benefits which gaming provides to America's communities. The government's lodging details the alleged harms of gaming, but completely ignores the positive consequences that gaming can create through jobs, increased tax revenue, capital expenditures, and tourism. This presents an incomplete picture of gaming's effects and undermines the government's contention that it has a substantial interest in discouraging casino gaming.

"The benefits of a new casino include shareholder profits, reduced local unemployment, economic growth in supplier markets, tax revenue for state and local governments, and increases in community property values." George *et al.*, *supra*, at 49 (AGAL 7). A recent study sponsored by the NGISC concluded that "a new casino, of even limited attractiveness and placed in a market that is not already saturated, will yield positive economic benefits on net to its host economy." Adam Rose & Assocs., *The Regional Economic Impact of Casino Gambling: Assessment of the Literature and Establishment of a Research Agenda* 22 (Nov. 5, 1998) (AGAL 12) (emphasis omitted). As the author documented, fifteen of the twenty-seven major studies on gaming have determined that casinos have a significantly or highly positive economic impact, while only two have found negative impacts. Dr. Adam Rose, *Testimony Before the NGISC* (Sept. 11, 1998, at 167); *see NORC Study*, at 52 (AGAL 2) (studying 100 communities and finding that casinos result "in a marked decrease in the percentage of the labor force that is unemployed").

A 1996 study performed by Arthur Andersen is instructive. After reviewing key economic figures, the survey

1996, American Association of Suicidology (Nov. 19, 1998) (AGAL 11).

reported that the "casino gaming industry is clearly an important provider of jobs, wages and taxes to the U.S. economy." Arthur Andersen, *Economic Impacts of Casino Gaming in the United States, Vol. 1: Macro Study* 15 (Dec. 1996) (AGAL 13). In 1995, the gaming industry paid a total of \$2.9 billion in direct taxes, employed almost 300,000 people and paid \$7.3 billion in wages—providing its employees with an average national wage that exceeded that of other entertainment industries—and invested \$3 for every \$1 earned. *Id.* at 1-15. Additionally, at the local level, "[t]housands of new jobs were created which provide good wages and full benefits," casino revenues enabled cities and States "to lower taxes and pay for many basic civil needs," and the introduction of casinos led "to growth in almost all other areas: retail sales, commercial and housing construction, restaurants, etc." Arthur Andersen, *Economic Impacts of Casino Gambling in the United States, Vol. 2: Micro Study* 9 (May 1997) (AGAL 14); *see* Eugene Martin Christiansen, *Gambling and the American Economy*, *Annals of American Academy of Political and Social Science* 36, 43-49 (Mar. 1998) (AGAL 15) (finding that the gaming industry pays billions of dollars in taxes, provides over 400,000 jobs, and provides substantial investment capital).

The gaming industry also provides significant social benefits to its employees and to local communities. A 1997 study of 178,000 gaming employees found, for instance, that more than 8.5% of the employees in the survey left welfare as a result of their casino jobs; almost 16% used their jobs to replace unemployment benefits; 63% obtained improved access to health care benefits; 43% received better access to day care for their children; and 65% developed new skills as a result of their gaming industry employment. Coopers & Lybrand L.L.P., *Gaming Industry Employee Impact Study* 2-3 (Oct. 1997) (AGAL 16).<sup>6</sup>

<sup>6</sup> The Coopers & Lybrand L.L.P. study was the first comprehensive nationwide study of gaming industry employees, and the re-



It is thus not surprising that forty-seven of the fifty States now allow some form of gaming, and that ten States allow non-Indian casino gaming, in addition to Michigan, which has authorized, but not yet implemented, casino games. *United States Gaming at a Glance*, Int'l Gaming & Wagering Bus. 21 (Sept. 1998) (AGAL 17). As recently as 1990, only two States—Nevada and New Jersey—had permitted non-Indian casinos to operate. I. Nelson Rose, *Gambling and the Law: Recent Legal Developments*, 1998 17 (Feb. 6, 1998) (AGAL 18). This "sea change in public attitudes" further "undermines any claim that a State's interest in discouraging its citizens from participating in" commercial gaming "is so substantial as to outweigh [petitioner's] First Amendment right to distribute, and the public's right to receive, truthful, nonmisleading information about a perfectly legal activity." *United States v. Edge Broad. Co.*, 509 U.S. 418, 440-441 (1993) (Stevens, J., dissenting) (arguing that the trend in the legalization of state-run lotteries "surely undermines" the government's assertion of a substantial interest in banning lottery advertisements in non-lottery States).

Therefore, the government's attempt to demonstrate the social costs of casino gaming seriously undervalues the impact of casino gaming in the United States. A more complete evaluation of the industry establishes that casino gaming produces substantial economic and social benefits in a growing number of America's communities.

#### **B. The Government's Evidence on the Harmful Effects of Gaming Is Fundamentally Flawed.**

The government has also not met its burden to demonstrate that reducing commercial casino gaming constitutes a substantial interest, because the evidence upon which it relies in this Court amounts to little more than "junk social science." The government's evidence is often supported by "fragments of social science research and reams

searchers surveyed almost 54% of the total industry employee base. *Coopers & Lybrand L.L.P.*, *supra*, at 2 (AGAL 16).

of anecdotal evidence." George *et al.*, *supra*, at 49 (AGAL 7). Thus, the studies are insufficient to demonstrate that gaming imperils the welfare of America's citizens, and "[s]uch speculation certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends." 44 *Liquormart*, 517 U.S. at 507 (Stevens, J.).<sup>7</sup>

1. As an initial matter, the mere existence of the NGISC undermines the government's attempt to show that sufficient information exists to justify the suppression of truthful speech. Congress created the NGISC in August 1996 in part because "questions have been raised regarding the social and economic impacts of gambling, and Federal, State, local, and Native American tribal governments lack recent, comprehensive information regarding those impacts." National Gambling Impact Study Commission Act § 2. By creating the NGISC, and by expressly finding that there was a lack of current information on the impact of gambling, Congress itself has acknowledged that research conducted prior to August 1996 is insufficient to show that gaming produces negative consequences. As a result, the studies in the government's lodging—all of which pre-date the creation of the NGISC—do not satisfy the government's burden to justify restrictions on commercial speech.<sup>8</sup>

<sup>7</sup> At least one circuit has applied the framework for assessing expert testimony from *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-592 (1993), to social science experts as well. See *Tyus v. Urban Search Management*, 102 F.3d 256, 263 (7th Cir. 1996) ("Social science testimony, like other expert testimony proffered under Fed. R. Evid. 104(a) for admission under Rule 702, must be tested to be sure that the person possesses genuine expertise in a field and that her court testimony adheres to the same standards of intellectual rigor that are demanded in her professional work.") (quotation omitted), *cert. denied*, 117 S. Ct. 2409 (1997). The issue of whether *Daubert* should apply to other kinds of expert evidence is also currently before this Court. See *Kumho Tire Co. v. Carmichael*, *cert. granted*, 118 S. Ct. 2339 (1998) (No. 97-1709).

<sup>8</sup> In contrast to the government's lodging, every study cited in section I.A., *supra*, post-dates the creation of the NGISC.

2. At a more specific level, the studies in the government's lodging are riddled with flaws and inconsistencies. The government begins by relying on testimony from a June 1985 hearing by the President's Commission on Organized Crime to demonstrate a link between organized crime and legalized gaming, Government's Lodging ("GL") at 49, but there are at least three problems with this evidence. First, the testimony is outdated and relies entirely on historical anecdotes of organized crime. *See, e.g.,* GL at 54 (describing the presence of organized crime in casinos in the early 1970s). Second, even when the testimony does seem to establish a connection between organized crime and gaming—*e.g.,* between organized crime and the "junket industry"—the witnesses admit that any connection is "of course" based on events which "pre-dated the advent of casino gaming" and is thus unreliable. GL at 61. Third, the witnesses themselves state that law enforcement has been "very successful" in keeping organized crime out of areas like Atlantic City, thereby nullifying any alleged link between organized crime and the gaming-entertainment industry. *Id.* Accordingly, the better view, as demonstrated by more recent studies, is that any relationship today between organized crime and gaming has not been established. *See, e.g.,* Margolis, *supra*, at 43 (AGAL 1).

3. The government next relies on a report by Maryland Attorney General J. Joseph Curran, Jr., who argues that "casinos are a bad idea" because of their impact on state and local crime. GL at 111. The best that can be said about the Attorney General's "study" is that it exemplifies the hazards that can result when non-experts attempt to analyze complex social issues in a political environment. Reviewing the Attorney General's report, Dr. David Giacomposi, a Professor in the Department of Criminology and Criminal Justice at the University of Memphis, concluded that "it is based on evidence that is selective, and, therefore, incomplete." David Giacomposi, *An Analysis of the Maryland Report "The House Never*

*Loses and Maryland Cannot Win \* \* \** 4 (1995) (AGAL 19). As Dr. Giacomposi explained:

There are four basic problems with the Attorney General's report. First, the Report exaggerates and distorts the impact of crime related to casino gambling and fails to utilize the accepted methods of analysis recommended by, among others, the FBI. Second, the Report does not accurately reflect the conclusions of academic writings. Third, the Report presents a distorted picture not only of the risk of victimization but also of the criminogenic factors and types of crime associated with casino gambling. Fourth, the Report does not employ a methodology that assures representativeness of the interviews and anecdotal evidence presented. [*Id.*]

Therefore, this evidence fails to support the government's assertion that casino gaming produces harmful effects.

4. The government next presents studies discussing compulsive and pathological gambling, but none of this research is persuasive either. First, many of the studies shed no light at all on the government's theory that casino gaming produces social costs. For example, the American Psychiatric Association paper, GL at 180, merely describes the features of disordered gambling, without examining any of its causes or possible harms.

Second, the studies that do purport to show that a substantial percentage of Americans are compulsive gamblers have been flatly contradicted by more recent, comprehensive surveys. As noted earlier, the non-partisan NORC report released in February 1999 shows that only 0.6% of adult Americans could be classified in the last year as pathological gamblers. *NORC Study*, at 22-23 (AGAL 2). The more recent studies also reveal no support for the assertion that compulsive gambling is directly linked to the rise in legalized gaming. *See, e.g., id.* at 26; Shaffer Testimony, at 61.

Third, most of the studies' authors admit that their own research is incomplete. For example, the article by



John B. Murray, GL at 338, which surveys virtually every other study identified by the government on the subject of pathological gambling, ultimately concludes that "[m]any gaps exist in the research," GL at 351, and that "[m]uch more information is needed to build on what research \* \* \* these questions ha[ve] yielded." GL at 338. Likewise, the article by Mark Dickerson, GL at 268, concludes that drawing judgments about the characteristics of disordered gambling is difficult because "adequate research has been so very slow in developing." GL at 279. And the piece written by Henry R. Lesieur and Robert L. Custer even contradicts the government's own thesis, stating that "we should *not* equate sheer availability of gambling with pathological gambling or its side effects." GL at 295 (emphasis added).

Fourth, several of the authors upon which the government relies have been severely criticized for their research methods and conclusions. One example involves Robert M. Politzer, GL at 305, who began analyzing the social impacts of gaming as early as 1981. Academics have recognized the "fundamental limitations" in Politzer's work and have termed his research "unsuitable for policy application to casino cost-benefit analysis." George *et al.*, *supra*, at 58-59 (AGAL 7).

5. The government also relies heavily—and tellingly—on a declaration by Robert Goodman. GL at 379. Goodman is an urban planner, not an economist, and he has no academic training in criminology or psychology. His book on the social and economic consequences of gaming, entitled *The Luck Business: The Devastating Consequences and Broken Promises of America's Gambling Explosion* (1995), relied solely on interviews—including, incredibly, only one discussion with officials from Nevada and Atlantic City—and has been described by academics as an "unabashed polemic" based entirely on "sweeping generalizations." Robert R. Detlefsen, *Killjoy is here: new anti-gambling hysteria*, Virginia Pilot, Nov. 13, 1995, at A6 (AGAL 20). *The Luck Business* "is a Halloween book, one that aims to frighten the reader but is marred

by one-sided and incomplete arguments that will convince only the credulous." David L. Rados, 16 *Journal of Macromarketing* 140, 142 (Spring 1996) (AGAL 21); see *Wagers of Sin*, Reason Magazine, at 26 (Dec. 1997) (AGAL 22) (Goodman's work "is not based on accepted economic theory. \* \* \* He doesn't seem to understand the most basic principles of consumer economics") (quoting Gabrielle Brenner, economist, Ecole des Hautes Etudes Commerciales, Montreal).<sup>9</sup>

6. Finally, the one study discussing compulsive gambling among adolescents is thoroughly unconvincing. The government cites to a study of students at an Atlantic City high school which purports to show that the dangers of compulsive gambling are heightened by societal acceptance of legalized gaming. GL at 438. This study draws its conclusion, however, from such defective sources as a high school newspaper poll and an interview with a high school counselor. By contrast, more recent and reliable studies show that adolescent gaming is not on the rise. The NORC study, for example, found that the percentage of young adults who have placed a bet in the last year was 10% less in 1998 than in 1974. *NORC Study*, at 10 (AGAL 2). Likewise, the Harvard Medical School study, which analyzed more than 120 other studies by academics and social scientists, found no "increase in the rate of gambling disorders among adolescents \* \* \* dur-

<sup>9</sup> In March 1994, Goodman wrote that 40% of all white-collar crime "had its roots in gambling." Robert Goodman, *Legalized Gambling as a Strategy for Economic Development* 59 (March 1994). Scores of newspapers, respected magazines, and public officials have since used this figure to oppose the growth of casino gaming. See Joseph M. Kelly, *The American Insurance Institute, Like THAT Bunny, Keeps Going and Going and Going* \* \* \*, 1 *Gaming Law Review* 209, 209 (1997) (AGAL 23). But the statistic has no basis. *Id.* at 210-212. Even gaming opponents have recognized that "[i]t is supposedly the product of the American Insurance Institute. In fact, no such organization exists, and no one has ever been able to locate a copy of a report documenting the claim." Joseph Tydings & Peter Reuter, *Casino Gambling: Bring In The Feds*, Wash. Post, Feb. 6, 1996, at A15.

ing the past two decades." Shaffer *et al.*, *supra*, at iv (AGAL 6). The government's evidence on this issue is outdated and unpersuasive.

In light of all the foregoing, the government has not met its burden under *Central Hudson* to demonstrate that it has a substantial interest in reducing participation in commercial casino gaming through a ban on the broadcast of gaming advertisements. As the more recent and credible studies demonstrate, casino gaming produces significant economic and social benefits without endangering the health, safety, or welfare of America's residents.

## II. THE BAN ON THE BROADCAST OF CASINO GAMING ADVERTISEMENTS DOES NOT DIRECTLY ADVANCE THE GOVERNMENT'S ASSERTED INTERESTS.

Even if the government had credible evidence to demonstrate that its interests are substantial, the advertising ban would still be fatally flawed because it fails to satisfy the remaining factors in the *Central Hudson* test. The third prong of *Central Hudson* requires the government to show that its restriction "directly advances the governmental interest asserted." 447 U.S. at 566. "[T]he regulation may not be sustained if it provides only ineffective or remote support for the government's purpose," *id.* at 564, and "[f]or that reason, the State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.'" 44 *Liquor-mart*, 517 U.S. at 505 (Stevens, J.) (quoting *Edenfield*, 507 U.S. at 771).

A ban on the broadcast of gaming advertisements cannot materially advance the government's purported interests in light of the myriad exceptions to § 1304. The Federal Communications Commission regulation implementing § 1304 provides that the advertising ban does not apply to state lotteries, fishing contests, Native American gaming, non-profit or governmental lotteries, and lotteries run as a promotional activity for commercial organizations. 47 C.F.R. § 73.1211(c). These exceptions render

it "impossible" for § 1304 "materially to discourage public participation in commercial" gaming. *Valley Broad. Co. v. United States*, 107 F.3d 1328, 1335 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1050 (1998). By permitting such advertisements, the government defeats the very goal which it classifies as substantial. Indeed, it allows advertisements for gaming and games of chance while simultaneously attacking such advertisements as ruinous of the country's social and moral fiber. *See Players Int'l, Inc.*, 988 F. Supp. at 506 ("[T]he underlying governmental policy \* \* \* is subverted by the exceptions to § 1304. The exceptions allow the same activities the government believes cause significant public harm.").<sup>10</sup>

This Court's opinion in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), is instructive. In that case, the Court concluded that a federal statute prohibiting disclosure of the alcohol content of beer on labels or in advertising violated the First Amendment. The Court was particularly troubled by the "overall irrationality of the Government's regulatory scheme," *id.* at 488, finding that the law's exemptions and inconsistencies "ensure[] that the labeling ban will fail to achieve" its stated goal. *Id.* at 489. As the Court wrote, "[t]here is little chance that [the labeling Act] can directly and materially advance its aim, while other provisions of the Act directly undermine and counteract its effects." *Id.* Likewise, in this case, there is "little chance" that § 1304 can directly and materially reduce participation in commercial casino gaming, while the numerous exceptions to the statute permit the broadcast of gaming advertisements and thus "undermine and counteract" the statute's effects. *Id.*

<sup>10</sup> A commercial speech restriction can directly advance a governmental interest even if it is underinclusive, *see, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 511 (1981), but where "a prohibition makes only a minute contribution to the advancement of a state interest [it] can hardly be considered to have advanced the interest 'to a material degree.'" *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 99 (2d Cir. 1998) (quoting *Edenfield*, 507 U.S. at 771).



In its initial opinion, the court below distinguished *Rubin* on the ground that it was based solely on "conflicts" between certain federal laws rather than exceptions to the federal statute. Pet. App. 33a. But that reading of *Rubin* is plainly incorrect. In discussing the "irrationality of the Government's regulatory scheme," the *Rubin* Court expressly emphasized the exceptions to the federal labeling law. 514 U.S. at 488. For example, the Court noted that while the labeling provision banned "the disclosure of alcohol content on beer labels, it allow[ed] the exact opposite in the case of wine and spirits." *Id.* Similarly, the Court remarked that the statute still permitted brewers to signal high alcohol content through use of the term "malt liquor." *Id.* at 488-489. Thus, *Rubin* did find that exceptions to the federal law rendered the government's commercial speech restriction unconstitutional, and that determination applies squarely in this case.<sup>11</sup>

The Fifth Circuit also erroneously relied on *Edge Broadcasting Co.*, 509 U.S. at 418, for the proposition that the government can allow other types of media to advertise gaming while still advancing its asserted interests. Pet. App. 10a. This Court held in *Edge* that the First Amendment permits Congress to ban the broadcast of lottery advertisements in non-lottery States, while allowing such broadcasts in lottery States, in an effort to support the

<sup>11</sup> In *Posadas*, this Court upheld a restriction on casino gambling advertisements despite the fact that the challenged regulation also permitted advertisements for horse races, cockfights, and the lottery. See 478 U.S. at 342-343. Nevertheless, as the Ninth Circuit has recognized, see *Valley Broad. Co.*, 107 F.3d at 1336, *Posadas* is easily distinguishable. In *Posadas*, the government defined its interest as "the reduction of demand for casino gambling." 478 U.S. at 341 (emphasis added). Thus, it was sufficient that the restriction reached casino gambling advertisements alone. See *id.* at 342-343. Here, by contrast, the government attempts to reduce participation in all types of commercial gaming. Therefore, any exceptions to the law which permit commercial gaming advertisements—including lottery, fishing contest, and Indian gaming advertisements—directly inhibit the advancement of the government's objectives.

policies of non-lottery jurisdictions. *Edge* was premised, however, on the existence of a direct link between the federal policy and the government's asserted interests; that is, the government sought to aid non-lottery States by banning advertisements in non-lottery States. *Id.* at 433-434. Here, by contrast, the government seeks to aid non-gaming States by banning advertisements in gaming States as well. Thus, while the government "accommodate[d] the countervailing interests of" gaming States in *Edge*, *id.* at 434, it stifles the interests of gaming States in this case.

The Fifth Circuit's unqualified assertion that the "government may legitimately distinguish among certain kinds of gambling for advertising purposes" is also misplaced. Pet. App. 9a. The government's ability to distinguish among different types of gaming through restrictions on commercial speech is still constrained by the First Amendment. As a result, the government may only differentiate among speakers if its restriction "directly advances the governmental interest asserted." *Central Hudson*, 447 U.S. at 566. Here, the restriction does not advance the government's interest, and it thus cannot withstand constitutional scrutiny.

Finally, the Fifth Circuit's statement that fulfillment of the "direct advancement" prong of *Central Hudson* "must be evident from the casinos' vigorous pursuit of litigation to overturn it" is an affront to principles of free speech. Pet. App. 10a. If accepted, this reasoning would surely chill constitutional challenges to government restrictions, because the challenge itself would be viewed as conclusive evidence of the restriction's effectiveness.<sup>12</sup>

Accordingly, this Court should find that the ban on broadcast advertisements for commercial gaming does not

<sup>12</sup> The Fifth Circuit's reasoning is also factually incorrect. The plaintiffs in this case are *broadcasters*, not casinos, and their "vigorous pursuit of [the] litigation," Pet. App. 10a, says nothing about whether the restriction directly advances the government's interests.

directly advance the government's asserted interests. The exceptions to § 1304 are too numerous—and the similarity to *Rubin* too great—to shield the statute from constitutional attack.<sup>13</sup>

### III. THE BAN ON THE BROADCAST OF CASINO GAMING ADVERTISEMENTS IS MORE EXTENSIVE THAN NECESSARY TO SERVE ANY PURPORTED GOVERNMENT INTEREST.

The restriction on gaming advertisements in § 1304 also fails the fourth prong of *Central Hudson* because it is more extensive than necessary to serve the government's asserted goals. This Court's "commercial speech cases require a fit between the restriction and the government interest that is not necessarily perfect, but reasonable." *Edge Broad. Co.*, 509 U.S. at 429. Any "speech restrictions must be 'narrowly drawn,'" and "[t]he regulatory technique may extend only as far as the interest it serves." *Central Hudson*, 447 U.S. at 565 (quoting *In re Primus*, 436 U.S. 412, 438 (1978)). Further, the government cannot "completely suppress information when narrower restrictions on expression would serve its interest as well." *Central Hudson*, 447 U.S. at 565. In light of these principles, the restriction at issue here is unconstitutional because (1) a broadcast ban is far more restrictive than necessary to achieve the government's objectives and (2) less speech-restrictive alternatives are readily available.

#### A. A Broadcast Ban Is Disproportionate to Any Alleged Harms Caused by Casino Gaming.

This Court has made clear that the method by which the government seeks to achieve its asserted goal must be

<sup>13</sup> It is worth nothing that even the FCC has expressed doubts about the constitutionality of § 1304. In a 1995 letter to the Chairman of the House Subcommittee on Telecommunications and Finance, all five FCC Commissioners suggested that Congress should eliminate § 1304, in part because they believed it to be "archaic and of questionable validity under the First Amendment." See Attachment to Letter from the FCC to the Hon. Jack Fields (May 26, 1995), at 28-29 (AGAL 24).

"'in proportion to the interest served.'" *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (quoting *In re R.M.J.*, 435 U.S. 191, 203 (1982)). "[T]he validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct," *Edge*, 509 U.S. at 430 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989)), and "[t]he scope of the restriction on speech must be reasonably \* \* \* targeted to address the harm intended to be regulated." *44 Liquormart*, 517 U.S. at 529 (O'Connor, J., concurring).

The restriction on broadcast gaming advertisements flunks these standards. As illustrated above, a number of recent studies have shown that gaming is not a pervasive problem in America's social and economic landscape. For example, "the casino effect is not statistically significant for any \* \* \* crime outcome measures," *NORC Study*, at 52 (AGAL 2), and "[t]he majority of Americans and Canadians gamble with little or no adverse consequences." Shaffer *et al.*, *supra*, at ii (AGAL 6). As a result, a ban on the broadcast of certain casino gaming advertisements is more extensive than necessary to achieve any possible government interests. The attempt to reduce gaming through § 1304 is akin to banning all commercials to thwart a few instances of consumer fraud; the sanction is far more severe than the "'overall problem the government seeks to correct.'" *Edge*, 509 U.S. at 430 (quoting *Ward*, 491 U.S. at 801).

In rejecting this argument, the Fifth Circuit drew a "direct inference from *Edge*" that the government may always use a ban on broadcast advertising to control demand for an activity. Pet. App. 15a. *Edge*, however, held only that a ban in non-lottery States could be used to support the interests of non-lottery States; it never held that a prohibition in both gaming and non-gaming States could withstand scrutiny. In fact, the Court viewed the statute in *Edge* as no broader than necessary precisely because it did not reach, and did "not interfer[e]" with,



the interests of gaming jurisdictions. 509 U.S. at 428. Here, of course, the statute *does* interfere with the interests of gaming jurisdictions, and thus fails the Court's standards for constitutional review.

Therefore, even if the government's interests were substantial, and even if the restrictions directly advanced those interests, § 1304 would still be unconstitutional, inasmuch as its restriction on truthful speech is not "in proportion to the interest served." *Fox*, 492 U.S. at 480 (quoting *In re R.M.J.*, 455 U.S. at 203).

#### B. Less Speech-Restrictive Alternatives Are Available.

The prohibition on the broadcast of gaming advertisements is also constitutionally suspect in view of the availability of less speech-restrictive alternatives to § 1304. While the government is not required to use the least restrictive means to pursue its objectives, *Fox*, 492 U.S. at 477, "the fit between means and ends must be narrowly tailored." 44 *Liquormart*, 517 U.S. at 529 (O'Connor, J., concurring) (quotation omitted). And in determining this "fit," "the existence of 'numerous and obvious less-burdensome alternatives to the restriction on commercial speech \* \* \* is certainly a relevant consideration.'" *Florida Bar*, 515 U.S. at 632 (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993)); see 44 *Liquormart*, 517 U.S. at 529 (O'Connor, J. concurring) ("The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's end and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny.").

Here there are a number of less burdensome alternatives which could be used to combat any harms which might result from commercial gaming.<sup>14</sup> For example, the

<sup>14</sup> Ultimately, it is the government's duty to show that less restrictive alternatives do not exist, not petitioners' responsibility

government could join the industry in supporting the National Center for Responsible Gaming ("NCRG"), the industry organization designed to promote outside research on the causes and effects of problem and underage gambling. See AGAL 25. In its first two years of existence, the NCRG has awarded more than \$2 million in grants to support scientific research for the understanding and prevention of disordered gambling. The AGA has also produced several training videos and workshops, and has sponsored a number of programs designed to increase awareness of problem and underage gambling, including a week of activities designed to promote responsible gaming in casinos across the country.

Alternatively, the government could work with the States to implement regulations to address disordered gambling. Nevada, for example, recently enacted a regulation which, *inter alia*, requires gaming establishments to post problem-gambling hotline telephone numbers and brochures describing where compulsive gamblers can get help, and mandates that gaming operators offer awareness training programs for all employees who interact with customers. See Nevada Gaming Comm'n Reg. 5.170 (1999) (AGAL 26). The government could also address its purported concerns by adding its voice to the marketplace of ideas through its own advertisements detailing the risks of disordered and underage gambling. See generally *Posadas*, 478 U.S. at 356-357 (Brennan, J., dissenting) (listing several alternatives to a ban on gaming advertisements); 44 *Liquormart*, 517 U.S. at 507 ("[E]ducational campaigns focused on the problems \* \* \* might prove to be more effective.") (Stevens, J.).

"[T]he availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive to [the party's] First Amendment rights, indicates that [the challenged statute] is more extensive

to show that they do. See *Central Hudson*, 447 U.S. at 570-571. Nevertheless, the AGA presents several alternatives here to demonstrate that the government cannot satisfy its evidentiary burden.

than necessary." *Rubin*, 514 U.S. at 491 (evaluating alternatives to a ban on disclosing alcohol content on labeling). Therefore, this Court should declare § 1304 unconstitutional in light of the government's inability to satisfy the fundamental requirements of the *Central Hudson* framework.

#### CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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